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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FLEET WALLACE MAULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. May a criminal defendant be convicted of engaging in a Continuing Criminal Enterprise ("CCE") under 21 U.S.C. §848, and thus be subject to a nonparolable sentence, without proof that the five or more persons he allegedly supervised or managed were acting "in concert" with each other?

2. Under the CCE statute, does the government sustain its burden of establishing a "continuing series of violations" by showing that the defendant engaged in a number of intermittent, unconnected narcotics smuggling ventures not driven by a single impulse?

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Fleet Wallace Maull, defendant in the action below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed on December 2, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit filed December 2, 1986, and as yet unreported, is reproduced in Appendix A. The judgment and commitment order of the United States District Court for the Eastern District of Missouri dated November 1, 1985, is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1986; no rehearing was sought. This petition was filed within 60 days of December 2, 1986. Jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves a provision of the Controlled Substances Act of 1970, entitled "Continuing Criminal Enterprise," 21 U.S.C. §848, which provides in pertinent part as follows:

"§848. **Continuing Criminal Enterprise**

Penalties; forfeitures

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2) . . . .

"(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

"(A) the profits obtained by him in such enterprise, and

"(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined:

"(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

"(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

"(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

"(B) from which such person obtains substantial income or resources.

"(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply . . . ."

STATEMENT OF THE CASE

Petitioner Fleet Wallace Maull admittedly engaged in cocaine smuggling trips to South America during the period 1975-83 from which he reaped substantial revenues. The evidence detailed some 18 importation ventures to South America during this eight-year period, almost all of which were organized by Kevin Madden, Douglas Hughes or Michael Kendrick. Petitioner personally participated in only five of these ventures, and some eight to ten other people were involved from time to time. Most of the smuggling was done by use of backpacks with secret compartments, and petitioner usually carried his own backpack, which was sometimes furnished to him by others. Upon reaching the United States, petitioner sold the cocaine to various different people, including some in Salt Lake City, Utah; Madison, Wisconsin; Colorado and Florida.

The evidence showed that petitioner was essentially an independent operator who sporadically and randomly worked with a variety of other persons to import contraband. He hauled

most of his own cocaine into the country. His goods were not secured from or sold through any organized distribution network but were supplied to various groups in different locations on an *ad hoc* basis.

Although petitioner was indicted, tried and convicted on four substantive narcotics charges, he did not and does not contest his conviction on those charges, for which he was sentenced to 24 years' imprisonment. He did and does protest the government's prosecution of him under the Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. §848, pursuant to which he was sentenced to thirty (30) years in prison without parole and ordered to forfeit all his property.

The evidence was scant that petitioner organized, supervised or controlled anyone. Nevertheless, the jury found that petitioner was a manager, supervisor or organizer of the requisite five persons, and the Court of Appeals affirmed that finding. That holding, though tenuous, is not challenged in this petition.

Two other elements of the CCE statute are directly implicated in this petition. First, there was admittedly no evidence that the five persons whom petitioner supposedly managed or supervised acted "in concert" with each other. The government took the position that as long as these individuals at some time acted "in concert" with petitioner, the concerted activity requirement of the statute had been satisfied.

Second, the statute also specifies that the predicate narcotics activities must constitute a "continuing series of violations," which has been defined to mean a series of at least three related, unintermittent narcotics offenses prompted by a single impulse. *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981); *United States v. Collier,* 358 F. Supp. 1351 (E.D. Mich. 1973), quoting *United States v. Mid-State Horticulture Co.,* 306 U.S. 161, 166 (1939). The government contended that the various importation trips were "related" because they all involved petitioner and argued that "they were 'set on foot by a single impulse,'

i.e., the impulse to deliver cocaine for profit" (Govt. Br., 8th Cir., p. 32).

Following the jury's guilty verdict on all counts, petitioner appealed the CCE conviction. The Eighth Circuit affirmed the conviction and the 30-year sentence imposed thereon. In response to petitioner's challenge to the "in concert" and "continuing series of violations" findings of the jury, the Court of Appeals held (a) that the statute does not require that "the individuals supervised or managed must work in concert with anyone but defendant" (Apdx. p. A-5) and (b) that petitioner engaged in a number of similar cocaine smuggling and distribution activities, thereby satisfying the "continuing series" requirement (Apdx. p. A-4).

Petitioner had never run afoul of the law before. He was not connected with organized crime, was not a underworld figure or a "kingpin" and had no history of violence. He acknowledged his responsibility under the governing drug laws and was sentenced to a substantial term of 24 years for those violations. Because of the government's misuse of the CCE statute to obtain what effectively amounts to a life sentence without parole against him, he requests this Court to stem the tide of such oppressive prosecutions by confining the language of the CCE statute to its plain meaning.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court of Appeals Has Rewritten the CCE Statute by Negating the "In Concert" and "Continuing Series" Requirements, Thereby Expanding Its Reach and Extending Its Harsh Penalty Provisions to Garden-Variety Narcotics Transactions, Rather than Focusing on Bosses of Criminal Enterprises as Intended by Congress.

The legislative history shows that the CCE statute, with its unforgiving, nonparolable sentences and harsh forfeiture provisions, was enacted by Congress as a response to professional, organized narcotics traffic and was aimed at the bosses of such structured distribution networks. See H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 18583, 91st Cong., 2d Sess. (1970). Concerns repeatedly expressed over the severity of penalties in the bill were ameliorated by proponents' assurances that such penalties would be reserved for the most professional of criminals, variously referred to in the hearings as the "organized crime racketeer," "a member of the Mafia," "organized criminal syndicates," and "LaCosa Nostra."

Early prosecutions under the statute were, as represented, aimed almost exclusively at the heads of organized crime or large-scale drug networks. See *e.g., United States v. Manfredi,* 488 F.2d 588 (2d Cir. 1973); *United States v. Sisca,* 503 F.2d 1337 (2d Cir. 1974); *United States v. Kirk,* 534 F.2d 1262 (8th Cir. 1976).

To guarantee the selective and restricted use of this statute as promised, Congress embodied a definitional scheme in the act requiring five elements in order to justify a CCE prosecution:

1. A felony violation of the federal narcotics laws;
2. As part of a continuing series of violations;
3. Which are undertaken in concert with five or more persons;

4. With respect to whom the defendant occupies a position of organizer, supervisor or manager;

5. From which he derives substantial income or resources.

This Court, in *Garrett v. United States,* ____ U.S. ____ 85 L.Ed.2d 764, 773 (1985), stated:

> "A commonsense reading of this definition reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug ring, not the lieutenants and foot soldiers."

In the present case, there is a serious question whether petitioner was a "top brass" figure inasmuch as he usually operated independently and, if anything, was subordinate to the organizers of these various ventures. Only a very expansive interpretation of the evidence would support the proposition that petitioner managed or supervised anyone. Nevertheless, the jury resolved this issue adversely to petitioner, and we recognize that this Court does not sit to review such factual determinations.

The remaining elements of the "carefully crafted" CCE definition, however, are equally important and in the context of this case present pure questions of law. They too have been imposed to restrict the law's reach to the leaders of major crime organizations engaged, in the words of the statute, in a "continuing criminal enterprise." In this transparent attempt to broaden the scope of the CCE statute, the government offered no proof on two of these essential elements, and they were effectively written out of the statute by the Court of Appeals. This judicial reformulation of this important and powerfully puntive statute requires this Court's attention in order to prevent the will of Congress from being thwarted by prosecutorial overreaching.

1. The Court of Appeals Misapplied and Improperly Expanded the CCE Statute by Holding that the Five or More Supervised Persons Need Only Act "In Concert" with Petitioner and Not with Each Other.

The CCE statute, by its terms, applies to an "enterprise" — a continuing criminal organization — of which the defendant is the presumed head. This durational and associational aspect is codified by, *inter alia,* the "in concert" requirement. The statute is not designed for the independent, "high volume" dealer who buys from different sources or who uses different "mules" to secure his contraband from time to time. Nor is it aimed at smugglers like petitioner, who simply pick up with whomever is in the marketplace at the time. It is directed at the "business" of drugs, *i.e.,* the concerted, organized movement of narcotics on a continuing, repeated basis.

The district court, over petitioner's objection, instructed the jury that the "managed" subordinates need only act "in concert" with petitioner, not with each other, and the Court of Appeals agreed.[1] This holding was consistent with dicta in *United States*

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[1] The district court rejected an instruction tendered by petitioner which would have required a finding of concerted action among the particpants and instead instructed the jury as follows:

> "With respect to the third essential element required to be proved to show a violation of 21, United States Code, Section 848 as charged in Count VI of the Indictment the term "in concert" means agreement in a common design or plan. It is not necessary for the Government to prove that any five or more persons were working in concert at any given moment within the time frame of the alleged enterprise; nor is it necessary for the Government to prove that all five persons were present at the same time. It is sufficient if the Government proves, beyond a reasonable doubt, that within the time period alleged in the indictment, the defendant Fleet Wallace Maull worked in concert, in a position of organizer, a supervisory position, or other position of management, with respect to five or more individuals to effectuate an agreement in a common design or plan, such design or plan having as its purpose violation of the Federal Narcotics Laws as charged in Count VI of the Indictment."

v. Becton, 751 F.2d 250 (8th Cir. 1984), *cert. denied,* 105 S.Ct. 3480 (1985), and is thus now enshrined as the "gospel" on this issue. As a result, a narcotics trafficker can presumably be convicted of a CCE offense if he travels to Miami with five different persons on five different occasions to obtain drugs or if he sells his wares to five diverse buyers.

The result in this case, and what it portends for the future, represents a gross perversion of the CCE statute. In *Jeffers v. United States,* 432 U.S. 137 (1977) (plurality opinion), this Court held that a conspiracy is the nub of a CCE violation. The Court flatly rejected the government's position that the act would apply "if five 'innocent dupes' each separately acted 'in concert with' the ringleader of the continuing criminal enterprise. . ." *Id.* at 147. The Court ruled that the "in concert" requirement was the equivalent of conspiracy and that the essence of conspiracy is agreement. In rejecting the government's contrary arugment and its suggested analogy to gambling violations under 18 U.S.C. §1955, the Court said:

> "Because of the silence of §1955 with regard to the necessity of concerted activity, the Court felt constrained to construe the statute to permit the possibility that the five persons 'involved' in the gambling operation might not be acting together . . . .
>
> "The same flexibility does not exist with respect to the continuing criminal enterprise statute. Section 848(b)(2)(A) restricts the definition to the crime of a continuing series of violations undertaken by the accused 'in concert with five or more persons.' Clearly then, a conviction would be impossible unless concerted activity were present." *Id.* at 147-48.[2]

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[2] The *Jeffers* opinion also observed the Congressional purpose of "providing severe penalties for *professional* criminals." *Id.* at 149 n.14 (emphasis added).

Indeed, the very term "enterprise" denotes a consensual network devoted to a common goal. In construing the same term as used in RICO, a first cousin of the CCE act, the Court in *United States v. Turkette,* 452 U.S. 576, 583 (1981), noted that an enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," which is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." It is precisely this type of proof which is wanting in this case and which the government contends — and the Court of Appeals agrees — is unnecessary.

Although the co-conspirators need not be acting all at the same time, they must at least have conspired together in order to create a single enterprise, rather than a number of separate enterprises, as existed in *Kotteakos v. United States,* 328 U.S. 750 (1946). The evidence in this record utterly fails to establish the existence of an overall "enterprise" within any arguably plausible meaning of that term. At most, under *Kotteakos,* the various characters portrayed by the evidence engaged in a number of individual drug conspiracies.

Here the government was not required to prove (a) that any of the managed or supervised persons in a given importation venture acted "in concert" with each other or (b) that any of the managed or supervised personnel in one venture acted "in concert" with the participants in any of the other ventures that supposedly were carried out by the "enterprise."

Since most drug transactions would typically involve at least five people, the government's revision of the CCE statute, as approved by the Eighth Circuit, has broadened the statute to include virtually every drug deal. Any pusher who engages in five different transactions can now be snared by an ambitious prosecutor, even though the defendant's various subordinates were completely independent of each other. This result expands the CCE statute far beyond the intent of — or the promises made to

— Congress. Because of the importance of this issue to the administration of the federal criminal law, this Court should review this case.

2. The Court of Appeals Misapplied and Improperly Expanded the CCE Statute by Holding that Petitioner's Own Presence in Several Different Narcotics Transactions Satisfied the Requirements of a "Continuing Series of Violations."

The statutory requirement of a "series of violations" has been construed to mean three or more *related* violations. *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981). The "continuing" element is satisfied if the activity is "set on foot by a single impulse and operated by an unintermittent force." *United States v. Collier,* 358 F. Supp. 1351, 1355 (E.D. Mich. 1973), quoting *United States v. Mid State Horticultural Co.,* 306 U.S. 161, 166 (1939).

The evidence in this case showed some 16 or 18 drug importation ventures over an eight-year period, five of which petitioner participated in personally. For the most part, the players varied from one trip to the next, and the fruits of the venture were sold to varying persons and groups in different parts of the country. (See Apdx. pp. A-6, A-7). Substantial periods of time elapsed when petitioner was not engaged in any drug activity at all. In short, there was no single impulse and the activity was intermittent. The Court of Appeals paid mere lip service to the *Mid-State Horticultural Co.* definition of "continuing" but ignored these dispositive facts in ruling that petitioner's activities were "continuing" simply because he "engaged in a repeated and related series of cocaine smuggling and distribution activities." (Apdx. p. A-4). Said another way, petitioner's own involvement satisfied the "continuing" criterion even though the episodes were sporadic and dissimilar.

The government in its appellate brief feebly argued that the acts were "related" because they were directed toward the ob-

jective to "further Maull's enterprise and yield him immense profits." It also urged rather lamely that the "single impulse" was the profit motive.[3] These contentions and the Eighth Circuit's holding have elevated circular reasoning to an art-form. The bottom line of the government's position is to vitiate this Congressionally imposed limitation. Again, the appellate court's obliteration of this requirement overlooks the fact that this statute is aimed at structured organizations engaged in the regular, organized business of high-volume drug trafficking. By holding that the "continuing" aspect can be satisfied by virtue of petitioner's own sporadic, unconnected but similar activities over a period of time, the court has permitted an irregular, independent first-time criminal to be incarcerated for life without the possibility of parole.

Petitioner is willing to pay his dues. He received 24 years in prison for the substantive offenses, but the government's flagrantly distorted construction and application of the CCE statute has effectively handed him a life sentence. While the drug problem is real, the solution is not to revamp the statute judicially so as to apply it to situations not warranted by its language or intended by Congress. Congress debated long and hard over the severe penalties contained in the CCE act and "carefully crafted" a definitional scheme to ensure that only hardened kingpins and heads of substantial, organized drug networks would be subject to such penalties. The decision below has eviscerated those protections. This case thus presents an important question of federal law warranting this Court's attention.

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[3] The financial aspect of the enterprise has been addressed elsewhere by Congress in §848(b)(2)(B), which requires the enterprise to generate "substantial income or resources."

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2399

United States of America,
Appellee,

vs.

Fleet Wallace Maull,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 8, 1986
Filed: December 2, 1986

Before ROSS, WOLLMAN and MAGILL, Circuit Judges.

WOLLMAN, Circuit Judge.

From approximately 1975 to 1983, appellant, Fleet Wallace Maull, took part in an extensive narcotics enterprise to import and distribute large quantities of cocaine. Maull and his partner, Michael Kendrick, purchased cocaine in Santa Cruz, Bolivia, and then smuggled it into the United States by concealing the cocaine inside backpacks equipped with secret compartments and by flying the cocaine in by small private aircraft. Once the cocaine reached the United States, Maull sold the cocaine personally and through distributors in St. Louis, Missouri; Boulder, Colorado; Panama City, Florida; and Salt Lake City, Utah.

Appellant was charged with conspiracy to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846; importation of cocaine in violation of 21 U.S.C. §§ 952(a) and 960(a)(1); attempted importation of cocaine in violation of 21 U.S.C. §§ 963 and 960(a)(1); traveling in interstate commerce in aid of an unlawful activity in violation of 18 U.S.C. § 1952; and with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. He was convicted on each of these counts and sentenced to a total of twenty-four years' imprisonment on the conspiracy, importation, attempted importation, and Travel Act counts. In addition, he was given a concurrent term of thirty years' imprisonment without the possibility of parole on the Continuing Criminal Enterprise charge.

Maull raises several points on appeal: 1) the evidence was insufficient to support his conviction on the Continuing Criminal Enterprise (CCE) charge; 2) the district court improperly instructed the jury on the CCE charge; 3) the CCE statute is unconstitutionally vague as applied to him; 4) the *ex parte* restraining orders and his pre-trial detention improperly denied him the ability to finance and assist in the preparation of his defense; 5) the court erred in denying his motion for a bill of particulars; 6) the district court improperly permitted the Government to elicit testimony from certain witnesses regarding their plea agreements;[1] and 7) the court erred in sentencing him to concurrent sentences on the conspiracy and CCE counts. We address each contention separately.

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[1] This contention is fully addressed in the companion decision of *United States v. Braidlow*, No. 85-2377 (8th Cir. 1986), decided this day.

CONTINUING CRIMINAL ENTERPRISE

Maull first contends that the evidence was insufficient to support his conviction under the CCE statute. In evaluating the sufficiency of the evidence, we are reminded that we must view the evidence in the light most favorable to the verdict, sustaining the verdict if supported by substantial evidence. *United States v. Casperson,* 773 F.2d 216, 221 (8th Cir. 1985). The Government is to be given the benefit of all reasonable inferences that can be drawn from the evidence, and factual disputes are to be decided in favor of the Government. *United States v. Garcia,* 785 F.2d 214, 225 (8th Cir.), *cert. denied,* 106 S. Ct. 1797 (1986).

In order to be convicted for violation of the CCE statute, 21 U.S.C. § 848, the following five elements must be satisfied:

1) a felony violation of the federal narcotics laws;

2) as part of a continuing series of violations;

3) in concert with five or more persons;

4) for whom the defendant is an organizer or supervisor;

5) from which he derives substantial income or resources.

United States v. Lewis, 759 F.2d 1316, 1331 (8th Cir.), *cert. denied,* 106 S. Ct. 406 (1985). The parties are not in dispute as to whether the first or fifth requirements have been met. They are in disagreement, however, as to whether Maull's narcotics violations were part of a continuing series of violations of federal narcotics laws and as to whether Maull was an organizer, supervisor, or manager with respect to five or more individuals.

A. Continuing Series of Violations

The CCE statute requires the Government to prove that the defendant's narcotics activities were part of a continuing series

of violations of federal narcotics laws. Maull alleges that there is no evidence in this case to indicate that the smuggling and distribution endeavors were part of a series of narcotics violations. Moreover, he contends his activities were not part of a continuing series of violations.

A continuing offense is a continuous illegal act or series of acts driven by a single impulse and operated by an unintermittent force. *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939); *United States v. Bergdoll*, 412 F. Supp. 1308, 1317 (D.Del. 1976). The term "series" requires "proof of three or more related violations." *United States v. Jones*, 801 F.2d 304, 307 (8th Cir. 1986); *United States v. Collier*, 358 F. Supp. 1351, 1355 (E.D. Mich. 1973), *aff'd*, 493 F.2d 327 (6th Cir.), *cert. denied*, 419 U.S. 831 (1974).

The evidence at trial established that from the mid-to-late 1970's through 1983, Maull engaged in a repeated and related series of cocaine smuggling and distribution activities. He persistently participated in smuggling trips to South America, frequently employing his method of concealing the cocaine in hidden compartments in backpacks. Once the cocaine reached this country, the eventual distribution was also organized and persistent. During the time period at issue, Maull regularly fronted, or advanced on credit, cocaine to Robert Busch for distribution in the St. Louis area. He also frequently sold large amounts of cocaine through Lee Ann Russo in Panama City, Florida, and Salt Lake City, Utah, and sold cocaine in Boulder, Colorado, as well. These activities amply satisfied the "continuing" and "series" elements of the statute.

B. Organizer, Supervisor, or Manager of Five or More Persons.

To be convicted of a CCE offense, a defendant must have acted in concert with five or more persons over whom he held a position of organizer, supervisor, or manager. This require-

ment of the CCE statute has been given a broad interpretation by the courts: the supervisory relationship need not exist at the same time with respect to all five individuals, the same type of supervision need not be exercised over each person, and the supervisor or manager need not be in personal contact with each person. *United States v. Jones,* 801 F.2d at 308; *United States v. Becton,* 751 F.2d 250, 254-55 (8th Cir. 1984), *cert. denied,* 105 S. Ct. 3480 (1985).

Maull maintains that the CCE statute was designed to reach only "kng pins" of highly structured drug organizations. The case law in this and other circuits belies this contention. *See Becton,* 751 F.2d at 255; *United States v. Mannino,* 635 F.2d 110, 117 (2d Cir. 1980); *United States v. Oberski,* 734 F.2d 1030, 1032 (5th Cir. 1984). These cases make it clear that a defendant need not have been the dominant organizer or manager of the narcotics enterprise to run afoul of the statute; he need only to have occupied some managerial position. *Becton,* 755 F.2d at 255.

Maull further asserts that the statute does not apply to him because the five individuals he is alleged to have supervised or managed did not act in concert with each other. We find this interpretation of the CCE statute to be unduly narrow and unsupported by the language of the statute. The statute itself provides that the illicit conduct must be "undertaken by [the defendant] in concert with five or more other persons..." Nowhere does the statute require that the individuals supervised or managed must work in concert with anyone but the defendant.

Similarly, Maull's interpretation is unsupported by the decisions in this circuit. In *United States v. Jones,* 801 F.2d 304 (8th Cir. 1986), the defendants, Jones and Pfeister, fronted drugs to five or more individuals; there was no indication that all five individuals had worked in concert with each other in reselling the drugs. The focal point of the court's analysis was not whether the five had worked in conjuction with each other, but rather

whether they had worked in concert with Jones and Pfeister. Likewise, in *United States v. Becton,* 751 F.2d at 254-55, the court unequivocally stated that the five or more persons need not have acted in concert.[2]

The evidence supports the jury's finding that Maull had organized, supervised, or managed at least five individuals. One of the persons he organized and managed was Robert Busch. Busch participated in smuggling trips with Maull on two occasions in 1983. Maull recruited Busch for the trips, bought his plane ticket, gave him a backpack to use, set the terms of his payment, determined the route to be taken and when the trip would occur, invested money for the trip, and negotiated the purchase of the cocaine. In addition to the smuggling trips, Maull fronted or consigned roughly one-half of a million dollars' worth of cocaine to Busch that Busch sold in the St. Louis area.

Kathleen Sitter and Susan Sitter also were organized and managed by Maull. They participated in an October 1980 trip to Peru with Maull and Kendrick to smuggle cocaine into this country. Maull and Kendrick provided the Sitters with two backpacks filled with cocaine, which the Sitters carried back to Madison, Wisconsin, for Maull and Kendrick. This trip was coordinated by Maull and Kendrick, and both Kathleen and Susan Sitter were aware they were transporting cocaine for Kendrick and Maull.

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[2] Appellant also asserts that the trial judge's instruction to the jury was defective because it failed to state that the five or more individuals allegedly supervised or managed by him had to work in concert with each other as well as with him. Furthermore, he claims that the instruction permitted the jury to combine persons engaged with appellant in separate enterprises in arriving at the requisite number of organized or supervised individuals. Based on our reasoning in the foregoing discussion, we find that the district court properly instructed the jury as to the requirements of the CCE statute.

Richard Rankin also worked as a courier for Maull. In 1981 he carried a backpack filled with Maull's cocaine into the United States and then delivered it to Maull in Madison, Wisconsin. Rankin also assisted Maull and other organizers of a sixty-seven kilogram transaction by smuggling "buy" money into Bolivia, using the backpack method.

Finally, Maull utilized Lee Ann Russo to expand his distribution network. Maull fronted Russo quantities of cocaine for sale in Panama City, Florida, for approximately three years. Once the cocaine was sold, Russo would deliver the proceeds to Maull. Furthermore, Russo twice arranged two-pound cocaine sales in 1980 to an individual known as "Uncle." Russo introduced Maull to "Uncle" and went with Maull to Salt Lake City to facilitate the drug transactions. Maull paid Russo's expenses and compensated her for her efforts by paying her in cocaine. Russo's efforts were thus supervised or managed by Maull.

C. Vagueness of the CCE Statute.

Conceding that the CCE statute is constitutionally valid on its face, Maull argues that it is unconstitutionally vague as applied to him. Vagueness challenges to statutes not involving first amendment rights are to be evaluated in light of the particular facts of each case. *United States v. Mazurie,* 419 U.S. 544, 550 (1975). "[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning of knowledge that the act which he does is a violation of the law." *Screws v. United States,* 325 U.S. 91, 102 (1945).

To be convicted of a CCE offense, an individual must have committed a series of narcotics felonies, each one involving specific intent. *United States v. Kirk,* 534 F.2d 1262, 1278 (8th Cir. 1976), *cert. denied,* 433 U.S. 907 (1977). Maull does not

deny that he knowingly and intentionally committed the underlying narcotics felonies that constituted the CCE offense. Hence, he can hardly argue that he lacked any warning or knowledge that his conduct here was unlawful.

EX PARTE RESTRAINING ORDERS AND DETENTION

Approximately one year before Maull was indicted, the Government seized his only asset, a home in Boulder, Colorado, in which he had an equity of more that $100,000. Civil forfeiture proceedings were instituted pursuant to 21 U.S.C. §881(a)(6) in the United States District Court for the District of Colorado. The Government alleged that the property was purchased with proceeds traceable to the sale of controlled substances. Maull by this time had retained counsel in Colorado and had executed a deed of trust on the Colorado home to secure his attorney's fees. Because of the Government's refusal to comply with orders of the court, the forfeiture action was dismissed on December 7, 1984, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

On January 10, 1985, the Government applied for and obtained another *ex parte* restraining order from the United States District Court in Missouri. Later, on the date scheduled for the hearing on the temporary restraining order, the Government applied for and obtained another and separate *ex parte* restraining order issued pursuant to 21 U.S.C. § 853(e)(1)(A). The January 1985 restraining order was then dismissed.

In the meantime, Maull who had surrendered himself upon return of the indictment, was ordered confined in Farmington, Missouri, some seventy miles from the office of his St. Louis attorney. He was not given a hearing prior to trial on either the forfeiture action in Colorado or on the two restraining orders in St. Louis.

Maull alleges that the *ex parte* restraining orders violated due process and that the restraining orders issued in St. Louis were

barred by principles of *res judicata*. He also asserts that the "cumulative effect" of the improper issuance and extension of the restraining order and detention in Farmington created a situation undermining his sixth amendment right to effectively assist in his own defense. We need not decide these issues, however, for we find that any error in issuing the challenged orders was harmless.

The essence of the harmless error doctrine is that "the constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall,* 106 S.Ct. 1431, 1436 (1986). The Supreme Court has made it clear "that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id. See Chapman v. California,* 386 U.S. 18, 24 (1967); *Rose v. Clark,* 106 S.Ct. 3101, 3105 (1986). We have reviewed the record and can confidently say that even if the issuance of the restraining orders and the pre-trial detention at Farmington amounted to a constitutional violation, the error was harmless beyond a reasonable doubt. Whatever impediments the restraining orders or detention caused, they did not prevent the counsel of Maull's choice from ably discharging his duties in representing Maull.

BILL OF PARTICULARS

Maull alleges that the trial court erred in denying his pretrial motion for a bill of particulars and his subsequent request before trial that he be given the names of the five or more individuals he was alleged to have organized, supervised, or managed. He claims that because these motions were denied he was not adequately apprised before trial of the identities of these individuals.

Maull bears a heavy burden on appeal in establishing that the district court erred in denying his request for a bill of particulars. A denial of a bill of particulars is within the discretion

of the trial court and is reversible only for an abuse of discretion. *United States v. Buffington,* 578 F.2d 213, 214 (8th Cir. 1978); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 130 (2nd ed. 1982). "The purpose of a bill of particulars is to inform the defendant of the nature of the charges against him and to prevent or minimize the element of surprise at trial." *United States v. Miller,* 543 F.2d 1221, 1224 (8th Cir. 1976), *cert. denied,* 429 U.S. 1108 (1977). So long as the defendant was adequately informed of the charges against him and was not unfairly surprised at trial as a consequence of the denial of the bill of particulars, the trial court has not abused its discretion.

We are satisfied that there was no abuse of its discretion in this instance. In response to Maull's motion for a bill of particulars, the Government provided the names of approximately sixty unindicted co-conspirators. This list contained the names of all but one of the individuals Maull organized. In addition, two weeks before trial, the prosecution turned over all *Jencks* material to the defense, including all statements of those individuals Maull organized. Lastly, before trial Maull was shown a chart that the prosecution used in its opening argument diagraming the structure of Maull's operations. This chart included all but three of the individuals the Government alleged that Maull organized. Considering the cumulative information Maull received before trial, then, he cannot be heard to say that he was not adequately apprised of the persons that the Government alleged he had organized, supervised, or managed.

CONCURRENT SENTENCES FOR CCE AND CONSPIRACY

Maull was sentenced to fifteen years' imprisonment on Count I, conspiracy to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and to thirty years' imprisonment on the CCE violation, the sentences to be served concurrently. Maull contends that it was improper for him to receive concurrent sentences for the conspiracy and CCE offenses.

The relevant inquiry is whether Congress intended that each violation to be punished separately. *Jeffers v. United States,* 432 U.S. 137, 155-56 (1977) (plurality opinion). In *Jeffers,* the defendant was convicted under 21 U.S.C. § 846 for being part of a conspiracy to distribute cocaine and heroin. In a separate trial he was also convicted under § 848, the CCE statute. He was sentenced to fifteen years under § 846, with a three-year special parole term, and was fined $25,000. For the CCE offense, he was sentenced to life imprisonment and given a $100,000 fine. The Court held that Congress did not intend to allow cumulative punishment for conspiracy and CCE offenses. According to the Court, "the reason for separate penalties for conspiracies lies in the additional dangers posed by concerted activity. Section 848, however, already expressly prohibits this kind of conduct. Thus, there is little legislative need to further this admittedly important interest by authorizing consecutive penalties from the conspiracy statute." *Id.* at 157. Since Jeffers had received a fine of $125,000, which was greater than the maximum fine of $100,000 permitted under the CCE statute, he was entitled to have the fine imposed in the second case reduced so that the total fines together were not greater than $100,000.[3] The continuing validity of the plurality opinion in *Jeffers* was later recognized in *Garrett v. United States,* 105 S. Ct. 2407, 2420 (1985), where the Court made a purposeful effort to reconcile its holding in *Garrett* with the plurality opinion in *Jeffers.*

In *Ball v. United States,* 105 S. Ct. 1668 (1985), the issue was whether a felon who was indicted on charges of receiving a firearm shipped in interstate commerce, 18 U.S.C. §§ 922(h)(1) and 924(a), and also for the possession of that same firearm, 18

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[3] The Court in *Jeffers* found it unnecessary to examine the issue of whether the prison sentences presented the possibility of cumulative punishment. 432 U.S. at 155 n.24. Based on the Court's reasoning in *Ball v. United States,* 105 S. Ct. 1668 (1985), however, we believe that the Court would find that such concurrent sentences amount to cumulative punishment.

U.S.C. App. § 1202(a)(1), could be convicted and concurrently sentenced for both crimes. The Court determined that Congress did not intend that a defendant's conduct be subject to punishment under both §§ 922(h) and 1202(a). Thus, the Court held that the only way to be faithful to Congress' intent would be to have the district court vacate one of the underlying convictions: "One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." *Id.* at 1673. The Court pointed out that there are potential adverse consequence in allowing the second conviction to stand. The second conviction, for example, may delay the defendant's chances for parole or may be used to impeach the defendant's credibility. *Id.* at 1674. Furthermore, even if the sentence is served concurrently with another sentence, it still carries the social stigma that attaches with any criminal conviction. *Id.*

In the light of *Jeffers* and *Garrett,* we hold that the CCE and conspiracy charges may not be the subject of double punishment. Accordingly, even permitting concurrent sentences for violations of both of these statutes would be contrary to Congress' intent. This is consistent with our prior decisions in *United States v. Samuelson,* 697 F.2d 255, 259-60 (8th Cir. 1983), *cert. denied,* 104 S.Ct. 1314 (1984), and *United States v. Kirk,* 723 F.2d 1379, 1381 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 1717 (1984), which were decided before *Garrett* and *Ball,* wherein we vacated the conspiracy conviction after the defendants received concurrent sentences for the conspiracy and CCE offenses.

The case is remanded to the district court with directions to vacate Maull's conviction under 21 U.S.C. § 846. In all other respects, the conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT AND PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Defendant: FLEET WALLACE MAULL

Docket No: 85-113Cr.(2)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: *November 1, 1985*

With Counsel: Lawrence Fleming, retained

Plea: ____ Guilty and the court being satisfied that there is a facutal basis for the plea,

____ Nolo Contendere,

____ Not Guilty

Finding & Judgment: There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly and willfully combining, conspiring, confederating and agreeing with others to distribute and possess with intent to distribute cocaine, a Schedule II narcotic controlled substance, in violation of T. 21, U.S.C. Section 841(a)(1); in furtherance of the said conspiracy and to effect the objects thereof, the defendant and coconspirators committed certain overt acts as set out in the indictment, in violation of Title 21, U.S.C., Section 846, as charged in Count ONE of the indictment. Knowingly and intentionally importing approximately six to ten kilograms of cocaine, a Schedule II narcotic drug controlled substance, into the United States from a place outside the United States. In violation of Title 21, U.S.C., Sections 952(a) and 960(a)(1), as charged in Count TWO of the indictment. Knowingly and intentionally attempting to im-

port approximately nine (9) kilograms of cocaine, a Schedule II narcotic drug controlled substance into the United States from a place outside the United States. In violation of Title 21, U.S.C., Sections 963 and 960(a)(1), as charged in Count THREE of the indictment. Traveling in interstate commerece with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving the unlawful importation and distribution of narcotics and controlled substances as defined by the Controlled Substances Act, and did thereafter perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity. In violation of Title 18, U.S.C., Section 1952, as charged in Count SIX of the indictment. Willfully and knowingly engaging in a continuing criminal enterprise in that defendant did willfully and knowingly violate Subchapters I and II of the Drug Abuse Control Act of 1970 in concert with five or more persons with respect to whom the defendant occupied a position of organizer, supervisor, or manager and defendant obtained substantial income and resources from said violations. In violation of Title 21, U.S.C., Section 848(a)(1). From his engagement in the continuing enterprise, defendant obtained substantial profits with which defendant would and did purchase and obtain certain property, contractual rights, and other interests to which the United States is entitled to forfeiture pursuant to Title 21, U.S.C., Section 848(a), as charged in Count SEVEN of the indictment.

Sentence or Probation Order:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged

and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWELVE (12) YEARS on Count II of the indictment.

IT IS FURTHER ORDERED that the defendant serve a special parole term of Three (3) Years.

IT IS ADJUDGED that on Count THREE of the indictment that the defendant is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of TWELVE (12) YEARS.

IT IS FURTHER ORDERED that the defendant serve a special parole term of THREE (3) Years.

Said sentence on Count THREE to run consecutively to sentence on Count TWO as to imprisonment and concurrently thereto as to the special parole term.

IT IS ADJUDGED that on Count SIX of the indictment (which was redesignated for trial purposes as Count FIVE) that defendant is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of FIVE (5) YEARS.

Said sentence on Count SIX to run concurrently with sentences herein imposed on Counts TWO and THREE.

IT IS ADJUDGED that on Count ONE of the indictment that defendant is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of FIFTEEN (15) YEARS.

Said sentence on Count ONE to run concurrently with sentences herein imposed on Counts TWO, THREE and SIX.

IT IS ADJUDGED that on Count SEVEN of the indictment (which was redesignated for trial purposes as Count SIX) that defendant is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of THIRTY (30) YEARS and forfeiture of defendant's interest in the property set out in this count. Pursuant to Title 21 U.S.C., Section 848(c), defendant is ineligible for release on parole as to the sentence imposed on this Count SEVEN.

Said sentence on Count SEVEN to run concurrently with sentences herein imposed on Counts TWO, THREE, SIX and ONE for an aggregate sentence of THIRTY (30) YEARS imprisonment to be followed by a special parole term of Three (3) Years.

Additional Conditions of Probation:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation:

The court orders commitment to the custody of the Attorney General and recommends

/s/ Edward L. Filippine
United States District Judge

Date: November 1, 1985